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NO. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH

PETITIONER

V:

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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September 11th, 1985

SEP 14 1985
JOSEPH P. SPANGLER
CLERK

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RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

The respondent, Commonwealth of Kentucky, by counsel, hereby requests this Court to deny the petition for certiorari seeking review of an opinion of the Supreme Court of Kentucky for the following reasons.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court granted certiorari in a rather similar case, Batson v. Kentucky, No. 84-6263, on April 22, 1985. The granting of certiorari in Batson appears to indicate a willingness to reconsider the questions relating to peremptory challenges addressed in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Certiorari should be denied in the case at bar since the Batson case will provide an adequate vehicle to consider questions relating to allegedly discriminatory exercise of peremptory challenges.

Furthermore, the factual differences between the case at bar and Batson demonstrate that the petitioner would not be entitled to a new trial even if this Court adopted an extreme remedy to prevent discriminatory exercise of peremptory challenges such as the remedy set out in People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

While the prosecutor in the case at bar, Mr. Gutman, who also was the prosecutor in Batson, exercised four (4) of his six allotted peremptory challenges against blacks in this case, as he did in Batson, other factors distinguish this case from Batson. In Kentucky, both sides exercise peremptory challenges in secret simultaneously at the conclusion of voir dire. RCr 9.36. After both sides exercised peremptory

challenges in the case at bar, at least one black prospective juror remained. The remaining black juror was eliminated by random selection of the clerk in reducing the jury to the required size. (Petitioner's Appendix, p. A-11.) Thus, unlike Batson, the prosecutor's strikes alone did not cause an all-white jury to hear the case against a black defendant. As a matter of fact, one of the four blacks stricken by the prosecutor, Olivia Williams, was also stricken by the petitioner.

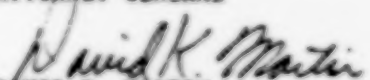
The case at bar is also distinguishable from Batson by the fact that the prosecutor in the case at bar denied any discriminatory motive in exercising peremptory challenges and even explained his reasons for exercising most of his peremptory challenges. He stated that although he was under no obligation to explain his peremptory challenges, he struck a young black man and young black woman because of their age. The prosecutor believed young people were less law and order oriented and were also in petitioner's age bracket, as he was twenty three years old at the time. He struck a white male for the same reason, and struck another white male based on his occupation. (Petitioner's Appendix, p. A-9.) It is not likely that Olivia Williams was the young black woman the prosecutor referred to, as Olivia Williams had a younger brother who had been arrested for bad checks eight years previously. (Transcript of Evidence, p. 17.) Both sides viewed Ms. Williams as an undesirable juror. In addition to such explanations of the prosecutor's motives for his peremptory challenges, Mr. Gutman categorically denied any racial motive and the trial judge apparently believed him.

(Petitioner's Appendix, p. A-6.) The prosecutor apparently viewed the mere questioning of his motives to be a personal affront. (*Id.*, p. A-5.)

Thus, it appears that only two of the prosecutor's six peremptory challenges went unexplained, and one of those strikes was a double strike against a black woman whose brother had an arrest record. Petitioner cannot even show a statistically suspicious exercise of peremptory challenges based on the two unexplained strikes. The prosecutor's credibility with the trial judge and his explanation of some of his strikes would satisfy the most radical standards proposed to prohibit racially motivated use of peremptory challenges. See, *People v. Wheeler*, 148 Cal.Rptr. 899, 583 P.2d 748, 765 (1970). Accordingly, petitioner cannot ultimately prevail even if this Court accepts the arguments advanced by the critics of *Swain v. Alabama*, *supra*. Accordingly, certiorari should be denied.

Respectfully submitted,

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PETITIONER


V.

CERTIFICATE OF SERVICE

COMMONWEALTH OF KENTUCKY

RESPONDENT

I, David K. Martin, counsel for respondent, hereby certify that the attached Respondent's Brief in Opposition to Petition for Certiorari was served on petitioner by hand-delivering, Messenger Mail, two copies to Hon. Larry H. Marshall, Assistant Public Advocate, Counsel for Petitioner, and Hon. Joanne M. Yanish, Assistant Public Advocate, Of Counsel, 151 Elkhorn Court, Frankfort, KY 40601, this 11th day of September, 1985.


DAVID K. MARTIN
ASSISTANT ATTORNEY GENERAL
MEMBER, BAR OF THE SUPREME COURT
OF THE UNITED STATES
COUNSEL FOR RESPONDENT

NO. 85-5221
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH

PETITIONER

V.

AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 28(2)

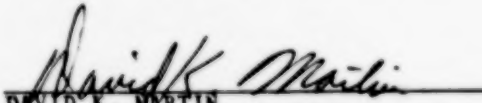
COMMONWEALTH OF KENTUCKY

RESPONDENT

I, David K. Martin, being first duly sworn according to law, depose and say:

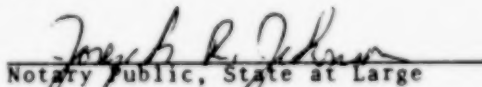
1. I am a member of the Bar of the Supreme Court of the United States.
2. I am counsel for respondent in the above-styled action.
3. The attached Respondent's Brief in Opposition to Petition for Certiorari, Notice of Appearance, and Certificate of Service were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.
4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid,

and properly addressed to Mr. Joseph F. Spaniol, Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, on September 11, 1985, thirty days after receipt of the petition by the respondent.


DAVID K. MARTIN
ASSISTANT ATTORNEY GENERAL
MEMBER, BAR OF THE SUPREME COURT
OF THE UNITED STATES

COUNSEL FOR RESPONDENT

Subscribed and sworn to before me by David K. Martin,
this 11th day of September, 1985.


Notary Public, State at Large

My Commission expires: March 21, 1987